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No. 84-

IN THE
Supreme Court of the United States

October Term, 1984

STATE OF ALASKA,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I.

Is the use of a lake in Alaska by floatplanes relevant to the issue of title navigability? Standing alone, is the uncontroverted use of Slopbucket Lake as a base for floatplane operations sufficient to establish title navigability?

II.

Was it an abuse of discretion to rule that floatplane use in Alaska is legally irrelevant to the issue of title navigability without providing the State of Alaska an opportunity to present its case at trial?

PARTIES INVOLVED

Petitioner is the sovereign State of Alaska, admitted to the Union on January 3, 1959.

Respondents are the United States of America; Donald Hodel, Secretary of the Interior; Robert Burford, Alaska State Director, Bureau of Land Management; Bristol Bay Native Corporation; and Iliamna Natives Limited. Respondents were appellees below and defendants in the district court.

Respondent Iliamna Natives Limited, by stipulation, did not participate in the proceedings below or in the district court but agreed to be bound by the result. Counsel for Iliamna Natives Limited has informed the State of Alaska that it will not participate actively in the proceedings before this Court but that it has an interest in the outcome.

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Petitioner, the State of Alaska, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 28, 1985.

OPINIONS BELOW

The opinion of the court of appeals is reported at 754 F.2d 851, and is set forth in Appendix A, *infra*, pp. A-1 - A-8. An unpublished amendment to that opinion is set forth in Appendix B, *infra*, p. B-1. The memorandum and order of the United States District Court for the District of Alaska is reported at 563 F. Supp. 1223, and is set forth in Appendix C. *infra*, pp. C-1 - C-9.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1985. On May 22, 1985 Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and including June 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves the federal test of title navigability and the State of Alaska's constitutional right to be admitted into the Union on an equal footing with all other states with respect to sovereign rights and powers. The case has significant ramifications for public land ownership and public use of waterbodies for purposes of transportation and commerce, particularly for access to public lands and remote areas in Alaska. If the lower court decision is not reversed, ownership of the beds of public waterbodies throughout Alaska may be placed in private hands, with the serious potential for long term restrictions on, or loss of, public control and access.

Under long-standing precedents of this Court, state ownership of the beds of navigable waters, in trust for the people of the state, is an inherent attribute of sovereignty protected under the equal footing doctrine. *Montana v. United States* , 450 U.S. 544, 551 (1981). The federal test of title navigability was established by this Court to identify those rivers and lakes which are properly classified as "navigable." At issue in this case is application of that test to one of the customary uses of rivers and lakes in Alaska—use for transportation conducted by floatplanes.

The State of Alaska brought this action to quiet title to the bed of Slopbucket Lake, a small lake in southwestern Alaska which serves as an important base for floatplane operations. Despite its diminutive size, the convenient location and natural physical characteristics of Slopbucket

Lake have combined to make it an integral part of an extensive inter- and intraregional transportation system that brings passengers, goods and mail both into and out of Alaska's "bush." Excerpt of Record in the Court of Appeals (E.R.) 171. In support of the title claim, the State of Alaska sought a declaratory judgment that this important public use of Slopbucket Lake for transportation purposes establishes navigability and, accordingly, that title to the bed of the lake vested in the State of Alaska at the time of statehood.

The significance of this case extends far beyond the shores of Slopbucket Lake. When Alaska entered the Union on January 3, 1959, floatplanes were and long had been a customary mode of water-based transportation in the state. The use of floatplanes in Alaska began in the 1920's and was already well-established by the end of that decade. Long before Alaska's statehood, floatplanes were a common mode of conducting transportation on rivers and lakes throughout the territory. The use of floatplanes was a major factor in the settlement and economic development of the state and was essential to Alaska's ability to achieve statehood. E.R. 107-110.

Today, the rivers and lakes used by floatplanes remain vital arteries in Alaska's transportation network. Due to Alaska's geography, immense distances, limited stage of development, and harsh climatic conditions, there are still very few overland highways in Alaska. Perhaps more than in any other state, Alaska's "highways" are the rivers and lakes upon which floatplanes and various types of boats can operate. In the vast undeveloped expanses of Alaska, these rivers and lakes continue to be the primary, and sometimes the sole, routes of travel. People, goods, equipment, natural resources, and the United States mail are transported all across the state by floatplanes using these natural highways. As Alaska develops and the population increases, the continued availability of Alaska's rivers and lakes for transportation in this traditional mode is becoming increasingly vital, not only

to the citizens of the State of Alaska but to people from around the world who travel to and seek to explore America's "last frontier." E.R. 80-82.

The federal government recognizes the importance of the use of Alaska's waterbodies for transportation conducted by floatplanes. In determining whether and where public easements should be reserved for access to and use of important public waterbodies, or "major waterways" as the federal government now calls them in Alaska, extensive use by floatplanes is considered compelling evidence. By regulation, a river or lake is considered a "major waterway" if it has "significant use in its liquid state by watercraft for access to publicly owned lands or between communities." 43 C.F.R. § 2650.0-5(o). In a classic example of "Newspeak,"[1] the federal respondents determined Slopbucket Lake to be a "major waterway" under that regulatory definition but nonnavigable under the conceptually similar but even broader definition of title navigability established by this Court. E.R. 205. Based upon the administrative policy decision to disregard floatplane use in making title navigability determinations, the federal respondents sought to convey fee simple title to the bed of Slopbucket Lake to respondents Bristol Bay Native Corporation and Iliamna Natives Limited, pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628. The State of Alaska, as sovereign trustee of the public's right to use and have access to Slopbucket Lake, and other lakes in Alaska which are important natural elements of Alaska's transportation system because of their use by floatplanes, initiated this action to challenge the federal government's exclusionary policy.

1. District Court Decision

In the United States District Court for the District of Alaska, the State of Alaska moved for summary judgment

[1] A term for government double-talk coined by author George Orwell in the novel *1984*.

on the basis of substantial, uncontroverted evidence that floatplanes are a customary mode of conducting transportation on water in Alaska, that Slopbucket Lake is used extensively for conducting transportation in this customary mode, and the unambiguous ruling of this Court that navigability does not depend upon the mode by which transportation is conducted, so long as customary in the state at the time of statehood. *United States v. Holt State Bank*, 270 U.S. 49,56 (1926).

On May 12, 1983 the district court issued a memorandum and order denying the State of Alaska's motion for summary judgment and granting the federal government's motion for partial summary judgment. The court ruled that use of a lake for transportation conducted by floatplanes is legally irrelevant to title navigability determinations. Appendix C, *infra*.

To arrive at that decision, the district court either ignored or paid mere lip service to this Court's legal precedents. Although title navigability is an issue of fact, the district court held no factual hearing and entered no factual findings. The district court acknowledged the principle that each application of the federal test of navigability is "apt to uncover variations and refinements which require further elaboration," *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406 (1940), but simply ignored the companion principle that the test of navigability is designed to embrace, not exclude, factual variations in modes of use which exist across the United States. *Id.*

The district court ruled that the State of Alaska might well have been able to persuade the trier of fact that floatplanes constitute a customary mode of conducting commerce in Alaska. The district court also conceded that floatplanes operate upon the water. The court found, however, that "absurd results would no doubt occur in the present case if floatplane use were deemed legally relevant in determining

navigability for title." 563 F. Supp. at 1227 n. 5; Appendix C, *infra*, p. C-6 n. 5. Without any factual basis for the underlying assumptions, the district court reasoned that "there are over three million lakes in Alaska and a great number of them are accessible by floatplane. A ruling in favor of the State would severely complicate the land selection scheme in Alaska which Congress set forth in the Alaska Statehood Act and ANCSA." *Id.*

The district court's decision was based entirely upon land management concerns both irrelevant to the factual issue of title navigability and in direct conflict with the constitutional principle that the State of Alaska has primary management responsibility for the rivers and lakes which serve as natural components of Alaska's transportation infrastructure. Without the benefit of either briefing or a hearing on its novel approach to title navigability, the district court simply disregarded the uncontested facts submitted by the state in support of summary judgment and ruled as a matter of law that floatplanes are not a mode of conducting commerce on water, at least for the purpose of determining navigability for title. Based upon that exclusionary legal ruling and the state's subsequent waiver of all title navigability claims independent of the activities of floatplanes, the district court dismissed the state's complaint with prejudice and entered final judgment in favor of all defendants. Appendix D, *infra*.

2. Court Of Appeals Decision

On appeal, the Ninth Circuit affirmed. The court of appeals correctly recognized that navigability is a flexible concept and that, under this Court's guiding precedents, the phrase "customary modes of trade and travel on water" must be liberally construed, taking into account transportation methods in use at the time of statehood. 754 F.2d at 854; Appendix A, *infra*, pp. A-5 - A-6. *Without citation of authority*, however, the court of appeals also declared that navigability necessarily involves utilization of the waterway

as a path between two points and therefore that only transportation methods that carry goods from point to point on the water are evidence of navigability.

Applying these newborn principles to the case before it, the court of appeals assumed as a fact that floatplanes do not travel on water. The district court, however, had made no such factual finding. To the contrary, the district court had refused to even consider, for misguided policy reasons, the evidence which was or could have been submitted by the State of Alaska establishing that floatplanes do travel on the water, sometimes for considerable distances. *See, e.g.*, E.R. 102.

The court of appeals' decision also failed to address compelling legal precedents brought to its attention. Over sixty years ago, nearly forty years before Alaska's statehood, Justice Cardozo had ruled that floatplanes are, in fact, a mode of water transportation:

> The latest of man's devices for locomotion has invaded the navigable waters, the most ancient of his highways. . . .
>
> We think the craft, though new, is subject, while afloat, to the tribunals of the sea. . . Any structure used, or capable of being used, for transportation upon water, is a vessel. All that remains is to ascertain the uses and capacities of the structure to be classified. . . A hydro-aeroplane, while afloat upon waters capable of navigation, is subject to the admiralty, because location and function stamp it as a means of water transportation.

Reinhardt v. Newport Flying Service Corp., 232 N.Y. 115, 133 N.E. 371, 371-72 (N.Y. 1921) (Cardozo, J.).

After considering the relevant facts and appropriate legal precedents, Justice Cardozo specifically rejected the same simplistic and incorrect analysis adopted by the lower courts in this case:

> It is true. . . that the function of movement in the water is auxiliary and secondary. . . . [but that] is no reason for

> the exclusion of jurisdiction. . . . [T]here must always, for at least some space, be movement upon the water before there is assent into the air. Jurisdiction cannot vary as the distance is short or longer.

Id. at 371. Despite the compelling logic of Justice Cardozo's opinion, the decision below did not even attempt to distinguish it, nor address the facts and policies which strongly suggest its applicability here.

REASONS FOR GRANTING THE WRIT

The decision below departs from the undisputed hallmark of this Court's jurisprudence on the federal test of title navigability: that navigability is a question of fact. The court's decision is unprecedented; it is inconsistent with prior decisions of this Court; it is inconsistent with the fundamental principles underlying the constitutional doctrine of title navigability; and it denies the State of Alaska equal footing. Compounding these errors, the court of appeals issued its novel and broadly sweeping legal ruling without providing the State of Alaska an opportunity to challenge the factual assumptions upon which the decision was based. The significance of these errors, together with the importance of the sovereign rights at issue and the immediate and potential effect of the decision, merit the exercise of this Court's certiorari jurisdiction.

1. The Decision Below Is Inconsistent With Prior Rulings Of This Court And The Fundamental Principles Of Title Navigability

For the first time in the history of title navigability litigation, the court of appeals in this case ruled that actual public use of a waterbody for purposes of transportation and commerce, conducted in a mode which was customary in the state on the date of statehood, may legally be disregarded. That decision cannot be reconciled with the quintessential

principle that navigability in the United States is an issue of fact, not an inflexible legal standard. *The Daniel Ball*, 77 U.S. (10 Wall) 557, 563 (1871). It is the waterbody's capacity for public transportation and commerce that determines navigability, not the manner or extent of that use. *The Montello*, 87 U.S. (20 Wall.) 430,441-42 (1874). Navigability does not depend on the particular mode of use but rather on the fact, if it be a fact, that the waterbody affords a natural channel for conducting useful commerce. *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926).

Over one hundred years ago, this Court accurately predicted:

> Vessels of any kind that can float upon the water . . . are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining . . . navigability.

The Montello, 87 U.S. (20 Wall.) at 442. That is exactly what has occurred in this case. Under this Court's controlling decisions, the extensive use of Slopbucket Lake for transportation conducted by floatplanes cannot be ignored simply because the mode of use is new. In apparent recognition of that legal reality, the court of appeals rested its exclusionary ruling instead on an unprecedented definition of the term "highway." By semantic sleight of hand, the court of appeals simply transformed the conceptual term "highway" into a limitation on the mode of public use necessary to establish title navigability.

This Court has consistently considered and rejected attempts to restrict the federal test of navigability by application of restrictive legal definitions of its terms. *See, e.g., Utah v. United States*, 403 U.S. 9, 11 (1971) (rejecting proposed interpretation of phrase "highway of commerce"); *United States v. Appalachian Power Co.*, 311 U.S. 377, 405-06 (1940) (rejecting proposed interpretation of phrase "natural and ordinary condition"); *The Propellor Genessee Chief v.*

Fitzhugh, 53 U.S. (12 How.) 443, 455-57 (1851) (rejecting attempt to substitute the *description* of public, navigable water *for the object intended to be described*). The court of appeals' departure from the well-established precedents of this Court deserves this Court's attention.

2. The Importance Of The Decision Below Warrants Review

The overall, long-term effect of the decision below cannot be precisely quantified. However, based as it is upon a precedent-setting legal interpretation, rather than a limited factual determination, its effect unquestionably extends far beyond the particular facts of this case.

The decision is certainly of tremendous importance in Alaska, and not only because public ownership of the bed of Slopbucket Lake hinges on the outcome. In vast areas of Alaska, the rivers and lakes upon which floatplanes operate are the primary if not the sole routes of travel. Public ownership of the beds of those rivers and lakes is a constitutionally guaranteed aspect of state sovereignty designed to assure, in perpetuity, the continued availability of those rivers and lakes for use by the people of the state and the nation. According to this Court:

> [T]itle necessarily carries with it control over the waters above them, whenever the lands are subjected to use. . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein, freed from the obstruction or interference of private parties.

Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892).

Without considering the particular facts of floatplane use on Slopbucket Lake, the court of appeals issued a sweeping legal ruling that totally excludes consideration of the activities of floatplanes from any title navigability case in Alaska,

regardless of the facts, and even though the use of floatplanes on other rivers and lakes in Alaska may and does occur in a variety of different factual settings.

The decision below, if not reversed, will permit the federal government to transfer title to the bed of Slopbucket Lake, and potentially many other rivers and lakes which serve as components of Alaska's transportation system, into private ownership. The critical importance and potentially disastrous consequences of such a decision have been unequivocally stated by this Court:

> To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers.

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845).

Although the full effect of transfer into private ownership of currently public waterways in Alaska cannot be foretold with complete accuracy, this Court has held that government regulation of privately-owned submerged land, even though the waters are properly subject to government control, is nevertheless subject to the constitutional prohibition on taking without just compensation. *Kaiser Aetna v. United States*, 444 U.S. 164, 173-74 (1979). State regulation of private property is also subject to social and political pressures which do not attend state regulation of state land. The federal test of title navigability was established by this Court to avoid these and other potential limitations on state control over public waterways. *Barney v. Keokuk*, 94 U.S. 324, 337-38 (1876). Because the title of the state depends upon the outcome, future possibilities cannot be ignored. *Cf. United States v. Utah*, 283 U.S. 64, 83 (1931).

Moreover, the effect of the legal limitation on title navigability findings invented by the court below may not be limited to Alaska. Although the extensive use of floatplanes may be unique to Alaska (the only other state to have entered the Union since the invention of floatplanes is Hawaii), the decision below could nevertheless have significant impacts elsewhere. The court of appeals ruled that the term "highway" in the test of title navigability requires that the transportation be conducted from point to point on the body of water. That legal ruling could be applied to limit title navigability decisions throughout the United States, where rivers and lakes often serve as only one portion of the route of travel. Logs in the Pacific Northwest begin their journey on land, travel a short but critical distance downstream, and complete their journey travelling overland. *See Puget Sound Power & Light Co. v. FERC*, 644 F.2d 779 (9th Cir. 1981). Similarly, small lakes in Minnesota and Wisconsin have long been recognized as navigable under the federal test even though the trips establishing navigability seldom begin and end on the shores of one lake. *See, e.g., United States v. Holt State Bank*, 270 U.S. 49 (1926) (Mud Lake in Minnesota); *Economy Light and Power Co. v. United States*, 256 U.S. 113, 117 (1921) (series of lakes, rivers and overland portages, in combination, established useful travel route).

The respondent federal defendants and Alaska Native corporations do not question the potentially significant scope of the decision in this case. To the contrary, in both the district court and the court of appeals, respondents repeatedly asserted that this case involves a significant issue potentially affecting title to millions of acres of submerged land throughout Alaska and the United States. *See, e.g.*, E.R. 210, 317-18, 429, 490, 505.[2] The district court and court of appeals

[2] The State of Alaska contested both the respondents' acreage estimates and respondents' theory that a finding of navigability for Slopbucket Lake would necessarily require a finding of navigability for every other body of water on which a floatplane theoretically could land. Under this Court's precedents, navigability is a question of fact. *The Daniel Ball* 77 U.S. at

court of appeals also recognized the importance of this case, stating in their opinions that they were breaking important new ground on an issue with potentially significant impacts on land ownership, land management and on the law of title navigability. The importance and significance of the issue presented, acknowledged by all parties (albeit for different and generally conflicting reasons), by the district court and the court of appeals, warrants review by this Court.

3. Exercise Of This Court's Supervisory Responsibilities Over The Lower Federal Courts Is Appropriate In This Case

The extent of Alaska's constitutional right to the beds of navigable waters, potentially affecting sovereign authority over rivers and lakes throughout Alaska, should not have been decided without providing the state with a full and fair opportunity to present evidence on all the facts which did or could have influenced either the deliberations or the outcome.

It is the settled jurisprudence of this Court that summary disposition is inappropriate where the legal issues are of particular significance, or novel, and can best be resolved only upon a fully developed record. *Arenas v. United States*, 322 U.S. 419, 431-32, 434 (1944); *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948). The State of Alaska's sovereign claim

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563. Each navigability case must therefore be decided on its own facts. *United States v. Utah*, 283 U.S at 87 (1931). Canoes have been recognized as evidence of navigability, *Economy Light & Power Co. v. United States*, 256 U.S. at 117, yet not every creek with enough water to float a canoe must be found navigable. *The Montello*, 87 U.S. (20 Wall.) at 442. Had the lower courts correctly issued a finding of navigability or nonnavigability based upon the particular facts of this case, that decision would not automatically have determined the navigability of any other waterbody in Alaska. The ruling that evidence of floatplane use legally is irrelevant to title navigability determinations, however, has foreclosed an important factual inquiry into the actual use of every waterbody in Alaska. Thus, the significance and effects of the decision in this case have been substantially increased by the manner of disposition below.

of navigability based upon floatplane use clearly constitutes such a case. Both lower courts acknowledged the significance of this case and the novelty of the issue. A complete understanding of the nature, extent, and importance of floatplane use in Alaska is essential to a well-reasoned decision in a case with the potential for significant, irreversible effects on public ownership and control over rivers and lakes throughout Alaska which are used for floatplane transportation. Indeed, both lower courts relied upon a variety of factual assumptions about the nature of floatplane use in order to reach their legal conclusions. The State of Alaska disputes those factual assumptions, yet it was never provided an opportunity to create a complete factual record.

In the district court, the State of Alaska moved for summary judgment based upon a wealth of undisputed information regarding the use of floatplanes on Slopbucket Lake and on the use and importance of floatplanes in Alaska. The district court ignored these factual materials and ruled as a matter of law that floatplane use is legally irrelevant to the navigability question. The court of appeals, perhaps recognizing the district court's erroneous legal analysis, *assumed* as a fact that floatplanes do not operate on the water and, based on that incorrect and unsupported fact, affirmed the district court's dismissal of Alaska's claims.

All the factual materials submitted to the district court revealed that floatplanes are used, *on the water,* in a wide variety of factual situations in Alaska. E.R. 80, 96, 102, 109, 422. Substantial evidence regarding floatplane use on Slopbucket Lake was also introduced. E.R. 145-182. Had the State of Alaska been given the opportunity to do so, however, the state could have and would have introduced substantial additional evidence demonstrating, for example, that lodge owners on Slopbucket Lake use their floatplanes to travel across the lake, make a short, airborne "portage" across the sand beach separating Slopbucket Lake from Lake Iliamna,

and continue on Lake Iliamna to the local trading post. The trip is made both to haul the lodge owners' supplies and, for a fee, to haul supplies to others.

If the uncontroverted evidence regarding floatplane use submitted by the State of Alaska in support of summary judgment was not conclusive on the issue of title navigability, the case should have been set for a trial in which all issues, including floatplane use, could have been thoroughly explored. The fact that the decision below rested on factual assumptions either outside of or flatly contradicted by the record is illustrative of the evils which can result from the failure to conduct a hearing in a case like this. The summary disposition below of this novel, important, and fact-dependent case was legally erroneous, a substantial deviation from this Court's guidelines for resolution of cases of such significance, and justifies exercise of this Court's supervisory responsibilities.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue. Indeed, so clear is the error of the decision below, particularly with respect to the refusal to consider the facts in this fact-dependent case, that summary reversal is appropriate.

DATED this 28th day of June, 1985.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF ALASKA, *Plaintiff-Appellant,* vs. UNITED STATES OF AMERICA, et al, *Defendants-Appellees.*	No. 84-3625 D.C. No. A81-265 Civ.

Appeal from the United States District Court
for the District of Alaska
District Judge James A. von der Heydt, Presiding

Argued and Submitted January 17, 1985

Filed February 28, 1985

OPINION

Before: WRIGHT and TANG, Circuit Judges, and THOMPSON,* District Judge.

WRIGHT, Circuit Judge:

This dispute over ownership of the bed of Slopbucket Lake raises an issue of first impression: whether floatplane use renders a small Alaska lake navigable for purposes of title under the "equal footing" doctrine. Our resolution of this issue potentially

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*Senior Judge of the District of Nevada.

affects ownership of thousands of acres underlying small lakes throughout Alaska.

FACTS

Slopbucket Lake is a small lake (approximately 20 acres)[1] in South Central Alaska, just north of Lake Iliamna, a much larger navigable body of water. Slopbucket, which was once a part of Iliamna, is now separated from the larger lake by a natural sand beach between 75 and 100 feet wide, and about four feet high. It is used extensively as a landing and takeoff spot for floatplanes, because of frequent high winds and rough waters on Lake Iliamna.

Procedural History

On January 23, 1980, the Alaska State Office of the United States Department of the Interior, Bureau of Land Management (BLM), determined that the bed of Slopbucket Lake was federally owned "public land" available for conveyance to defendants Iliamna Natives Limited and Bristol Bay Native Corporation (BBNC), pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628.[2]

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[1]There is some dispute over its exact size, with estimates ranging from 20 to 80 acres. The name "Slopbucket" was coined by previous Fish and Wildlife Service employees. Evidently, they lived in a cabin on the spit between Lakes Iliamna and Slopbucket, and would draw drinking water from Iliamna, then dump their slopbuckets on the other side of the spit. Lake Iliamna is the largest lake in Alaska, encompassing 1,150 square miles.

[2]Pursuant to 43 C.F.R. 2650.5-1(b) (1983), the BLM is charged with determining whether bodies of water located within native land selections made under ANCSA are navigable. Under BLM departmental policy, floatplane use is not considered a customary mode of travel upon water for purposes of title navigability. *See* Memorandum issued in 1976 by Hugh C. Garner, Associate Solicitor, BLM, Division of Energy and Resources. Excerpt of Record (E/R), Vol. III, pp. 456-471.

Effective December 5, 1983, all Alaska lakes over 50 acres in size are meandered in accordance with BLM, *Manual of Surveying Instructions*, (1973), and "Alaska Native corporations organized pursuant to [ANSCA] . . . shall not be charged for submerged lands beneath water bodies . . . meandered . . . ." BLM, *Interim Waiver of Regulations and Establishment of Policy*, 48 Fed. Reg. 54 483 (1983).

In April 1981, the state initiated this quiet title action, alleging that use of Slopbucket Lake by floatplanes and related watercraft rendered the lake navigable for title purposes.

Alaska moved for summary judgment on the ground that there was no genuine issue as to any material fact concerning (1) the extensive commercial use of Slopbucket Lake by floatplanes, both presently and at the time of statehood and (2) the fact that floatplanes constituted a customery mode of trade and travel on water at the time of statehood.

The federal defendants moved for partial summary judgment on the "ground that, as a matter of law, aircraft use does not render a water body navigable for purposes of determining ownership of the bed." Federal Defendants' Motion for Partial Summary Judgment. The district court denied the State's summary judgment motion and granted the defendants'. The court held that "'. . . floatplane activities on Slopbucket Lake are not modes of conducting commerce on water for the purpose of determining navigability for title. Such activities are legally irrelevant to the navigability determination." *Alaska v. United States*, 563 F. Supp. 1223, 1228 (D. Alaska 1983).

The State moved unsuccessfully for an amendment to the district court's order permitting an interlocutory appeal under 28 U.S.C § 1292(b). The State then waived any claim to the "navigability of Slopbucket Lake independent of the activities of floatplanes." Alaska's Motion to Vacate Trial. The motion was granted and judgment entered in favor of all defendants. Alaska appealed.

ANALYSIS

Standard of Review

An appeal from an order granting or denying a summary judgment is reviewed de novo. *Philpott v. A. H. Robins Co.*, 710 F.2d 1422, 1423 (9th Cir. 1983). All "evidence and factual inferences" must be viewed in the light most favorable to the adverse party

and the summary judgment may be upheld only if "there are no genuine issues of material fact and [the movant is] entitled to judgment as a matter of law." *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1145 (9th Cir.), *cert. denied*, 104 S. Ct. 151 (1983).

Navigability

Under the "equal footing doctrine," the federal government holds title to the beds of navigable waterways "in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States." *Montana v. United States*, 450 U.S. 544, 551 (1981).[3] Whether a particular body of water is navigable for purposes of title is a question of federal law. *Utah v. United States*, 403 U.S. 9, 10 (1971).

The federal test for navigability was first articulated in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). The Court said:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The issue in *Daniel Ball* was admiralty jurisdiction but the Supreme Court has adopted the same test for title purposes. *See, e.g., United States v. Utah*, 283 U.S. 64, 76 (1931) (quoting

[3]The title is subject to Congress' paramount power over navigable waters under the Commerce Clause, and prior conveyances by Congress in certain limited circumstances not applicable here. *Montana*, 450 U.S. at 551-52. The Submerged Lands Act, 43 U.S.C §§ 1301-1315, confirms the State's existing rights under the equal footing doctrine. *See Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313, 324 n.19 (1973), *overruled on other grounds, Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). The doctrine itself is grounded in the Constitution. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

Daniel Ball), *Oregon v. Riverfront Protection Ass'n*, 672 F.2d 792, 794 (9th Cir. 1982). Of course, we must consider the context in which a navigability determination is made before evaluating its precedential effect. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979).

However, when the central issue is navigability, a case applying the *Daniel Ball* test provides guidance. For instance, in *Riverfront Protection Ass'n*, 672 F.2d at 795, we looked for guidance to *Puget Sound Power & Light Co. v. FERC*, 644 F.2d 785, 788-89 (9th Cir.), *cert. denied*, 454 U.S. 1053 (1981), although in *Puget Sound* we were determining navigability for Commerce Clause purposes. However, we did so only after considering the difference between title navigability and Commerce clause analysis. *See Riverfront Protection Ass'n*, 672 F.2d at 794 n.1.

A. *The Mode of Transportation*

Alaska argues that floatplane use was a "customary [mode] of trade and travel on water" at the time of statehood. *Daniel Ball*, 77 U.S. at 563. Alaska points to language in *The Montello*, 87 U.S. 430, 441-42 (1874), where the Supreme Court said a river was "navigable in fact . . . [i]f it [is] capable in its natural state of being used for purposes of commerce, *no matter in what mode the commerce may be conducted*. . . ". (emphasis added). The State contends that since floatplanes are a mode of commerce that operates partially on water, their use necessarily renders Slopbucket Lake navigable.

[2] Alaska reads *The Montello* too broadly. There, the Court based navigability on the use of shallow draft Durham boats propelled by animal power, and refused to limit navigability to waterways open only to steam or sail vessels. However, the crux of the test is still the requirement that the body of water be susceptible of use as a highway or channel for commerce on water. *Utah v. United States*, 403 U.S. at 11. This necessarily involves the utilization of the waterway as a path between two points.

We recognize that navigability is a flexible concept and "[e]ach application of [the *Daniel Ball* test] . . . is apt to uncover

variations and refinements which require further elaboration." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406 (1940) (navigability test applied in commerce clause analysis). For this reason, we have liberally construed the phrase "customary modes of trade and travel on water," *Daniel Ball*, 77 U.S. at 563, taking into account transportation methods in use at the time of statehood. *See, e.g., Riverfront Protection Ass'n*, 672 F.2d at 795 (floating logs—title navigability); *Puget Sound Power & Light Co.*, 644 F.2d at 788-89 (floating of shingle bolts sufficient for navigability in context of federal regulatory jurisdiction). Nevertheless, the central theme remains the movement of people or goods from point to point on the water.

Alaska argues that Slopbucket Lake is an integral part of an air and water highway over which floatplanes travel throughout the Bristol Bay region of Alaksa. However, in this context, the lake is a terminus or launching point for floatplanes, not "a *channel* for useful commerce." *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (emphasis added). The floatplanes go to and from the lake; they do not travel on the water.

Prior Treatment of Floatplane Use

A. *Case Law*

The reported decisions mentioning floatplane use in the context of title navigability provide little guidance. In *Steel Creek Development Corp. v. James*, 58 N.C. App. 506, 294 S.E. 2d 23, 27, *rev. denied*, 306 N.C. 740, 295 S.E.2d 763 (1982), the court in dictum dismissed evidence of floatplane use and recreational boating as insufficient to support a claim of navigability. In *Snively v. State*, 167 Wash. 385, 9 P.2d 773 (1932), the Washington Supreme Court squarely rejected the argument that the potential use of Angle Lake[4] as a landing spot for floatplanes rendered the lake navigable.

[4]Angle Lake is a small resort lake, located on the flight path between the southern end of Lake Washington and Tacoma.

The district court in *Minnehaha Creek Watershed Dist. v. Hoffman*, 449 F. Supp. 876, 880 (D. Minn. 1978), *aff'd in part, rev'd in part*, 597 F.2d 617 (8th Cir. 1979), mentioned floatplane use in an extensive laundry list of factors for determining jurisdiction under the Rivers and Harbors Act of 1899 § 10, 33 U.S.C. § 403. However, the other factors were much more substantial and the Eighth Circuit omitted any reference to floatplanes in the appellate opinion.

C. *Administrative Determination*

The BLM, pursuant to departmental policy, determined that Slopbucket Lake was not navigable.[5] In *United States v. Oregon*, 925 U.S. at 23, the Court said it was "not without significance that the disputed area [had] been treated as non-navigable both by the Secretary of the Interior and the Oregon courts."

Since we reach the same conclusion as did the BLM after *de novo* review, we need not decide whether or to what extent we should defer to the BLM's navigability determination when that determination is not before us for review.

CONCLUSION

For purposes of defendant's summary judgment motion, we assume that Slopbucket Lake was at the time of statehood and still is used extensively for takeoff and landing by floatplanes. Since "susceptibility . . . rather than . . . extent of actual use, is the

[5]Alaska argues this is inconsistent with a BLM determination that Slopbucket Lake is a "major waterway" for purposes of 43 C.F.R. § 2650.05(a) (1983), based on floatplane use. *See* BLM Memorandum dated May 20, 1982, E/R vol. I., pp. 205-206. Section 2650.05(a) defines a "major waterway" to include a "lake which has significant use in its liquid state by watercraft for access to publicly owned lands or between communities. Significant use means more than casual, sporadic or incidental use by watercraft including floatplanes . . . ." The BLM navigability determination is not before us, so we need not consider whether it is inconsistent with the regulation. However, the designation of a waterway as major for purposes of easements is qualitatively different from a title navigability determination. *See Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664, 678 (D. Alaska 1977).

crucial question," *United States v. Utah*, 283 U.S. at 82, further evidence would not aid our inquiry.

[1] We agree with the district court that use of Slopbucket Lake by floatplanes and related incidental watercraft is insufficient as a matter of law to render the lake navigable for purposes of title. Since Alaska waived all navigability claims independent of floatplanes, judgment for defendants was proper.

For the same reason, Alaska's summary judgment motion was properly denied.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF ALASKA,
Plaintiff-Appellant,

vs

UNITED STATES OF AMERICA; WILLIAM CLARK, Secretary of the Interior; MICHAEL J. PENFOLD, Alaska State Director, Bureau of Land Management; BRISTOL BAY NATIVE CORP.; and ILIAMNA NATIVES LIMITED,
Defendants-Appellees.

No. 84-3625

DC# A81-265 Civil

ORDER CORRECTING OPINION

Before: WRIGHT and TANG, Circuit Judges, and THOMPSON, Senior District Judge.

The court has considered the motion of the state of Alaska to amend the opinion, together with the opposition filed by counsel for defendant-appellee, Bristol Bay Native Corporation. The motion is granted.

The opinion filed on February 28, 1985, is corrected as follows:

At page 9, line 7, of the opinion as filed, the words "and related incidental watercraft" are deleted. The paragraph at page 9, lines 6 through 10, is corrected to read:

> We agree with the district court that use of Slopbucket Lake by floatplanes is insufficient as a matter of law to render the lake navigable for purposes of title. Since Alaska waived all navigable claims independent of floatplanes, judgment for defendants was proper.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

STATE OF ALASKA, Plaintiff, vs UNITED STATES OF AMERICA; JAMES WATT, Secretary of the Interior; CURTIS V. McVEE, Alaska State Director, Bureau of Land Management; BRISTOL BAY NATIVE CORP.; and ILIAMNA NATIVES LIMITED, Defendants.	MEMORANDUM AND ORDER

A81-265 CIV

THIS CAUSE comes before the court on cross-motions for summary judgment. Jurisdiction exists based on 28 U.S.C. §§ 1331 and 1346(f).

I. *BACKGROUND*

The suit is primarily an action to quiet title to submerged lands beneath a small lake in southern Alaska.[1] The court is asked to rule on a unique and seldom litigated question, *viz.*, whether floatplane use may be considered in applying the federal navigability test for determining title to submerged lands. The lake at issue, Slopbucket Lake, is located just north of Iliamna Lake. On January 23, 1980,

[1]The State's pleadings refer to the lake as both twenty and eighty acres in size. Bristol Bay Native Corporation states that the lake is less than thirty acres. While this discrepancy constitutes a genuine issue of fact, it is not a material fact for the purpose of resolving the present motions.

the BLM concluded the lake was non-navigable for the purpose of determining the acreage and entitlement of native corporation land selections under the Alaska Native Claims Settlement Act (ANCSA). *See* 43 U.S.C. § 1611 (1976); 43 C.F.R. § 2650.5-1(b) (1982). This administrative decision is not being challenged in the present lawsuit. Interim conveyances for land beneath the lake were executed between the federal government and Native corporations pursuant to ANCSA. *See id.* § 2650.0-5(h) (1982). Iliamna Natives, Ltd. (Iliamna) was granted rights in the surface estate and Bristol Bay Native Corporation (BBNC) was granted rights to the subsurface estate. *See generally* 43 U.S.C. § 1613 (1976). The State of Alaska then brought this suit to quiet title to the lands beneath Slopbucket Lake.

The primary legal issue concerns application of the test for determining navigability for title. This test reflects a long-standing federal policy, first enunciated by the Supreme Court, regarding who owns title to much of the submerged land in our country.

In 1842, the Court acknowledged the English common law doctrine of public trust to the effect that "dominion and property in navigable waters, and in the lands under them [were] held by the king as a public trust. . . ." *Martin v. Waddell*, 41 U.S. 234, 263; 16 Pet. 367, 411 (1842). It further declared that once the Revolution took place, "the people of each state became themselves sovereign; and in that character [held] the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Id.* at 262-63, 16 Pet. at 410. *Martin v. Waddell* dealt with one of the original thirteen state's (New Jersey) right to submerged land. Shortly thereafter, the Supreme Court made clear that new states have the same rights to submerged lands as did the original states. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1845). Hence, under what is commonly referred to as the doctrine of equal footing, newly admitted states to the Union acquire the same property interests in submerged lands as that enjoyed by the thirteen original states succeeding to the British Crown. *Utah v. United States*, 403 U.S. 9, 10 (1971). *See Montana v. United States*, 450 U.S. 544, 551 (1981); *Oklahoma*

v. Texas, 258 U.S. 574, 583 (1922). The States' absolute right to lands underlying navigable waters within their boundaries is recognized by Congress,[2] but conferred by the Constitution. *See Oregon ex. rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

The central inquiry for determining title to submerged lands focuses on the concept of navigability as defined by the Supreme Court. Case law makes clear that navigability for this purpose is a question of federal law to be determined by the rule recognized and applied in the federal courts. *United States v. Oregon*, 295 U.S. 1, 13 (1935); *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926).

A body of water is navigable under federal law when it is used or susceptible of use in its ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). This test has not changed since its inception. Courts applying the test should be aware, however, that the concept of navigability is used for different purposes.[3] In this case, the navigability test is being used for the purpose of determining title to submerged land.

Much case law has been written in elucidating precise meanings for various words in the definition for navigability. Some of these cases reflect an expansion of the type of waterbodies that may be considered in determining navigability. The Supreme Court has expanded, beyond the rule at English common law,[4] the types of

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[2]*See e.g.*, Submerged Lands Act, § 2(a), 430 U.S.C. § 1301(a) (1976); Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 343 (1958).

[3]*See, e.g, Utah v. United States*, 403 U.S. 9 (1971) (navigability determined in resolving title to land); *United States v. Appalachian Electric Power co.*, 311 U.S. 377 (1940) (navigability determined regarding Congress' power to license construction of dams pursuant to Commerce Clause); *The Robert W. Parson*, 191 U.S. 17 (1903) (navigability determined regarding admiralty jurisdiction).

[4]At common law, the test for navigability extended only to those waters subject to the ebb and flow of the tide. *See The Daniel Ball*, 77 U.S. (10 Wall.) at 563. *See also, The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825).

waterbodies that may be deemed navigable for the purpose of determining title. Non-tidal as well as tidal bodies of water may be regarded as navigable. *Barney v. Keokuk*, 94 U.S. (IV Otto) 324, 328 (1876). Lakes also may be deemed navigable for this purpose. *See Utah v. United States*, 403 U.S. at 11. Hence, it is conceivable that although Slopbucket Lake is a non-tidal body of water, it might be deemed navigable for the purpose at issue.

II. THE SUMMARY JUDGMENT MOTIONS

Federal defendants seek partial summary judgment to the effect that aircraft use cannot render a waterbody navigable for the purpose of determining navigability for title. The State's cross-motion for summary judgment requests the court to rule as a matter of law that Slopbucket Lake was navigable in its entirety on the date Alaska entered the Union, and title to the bed of the lake vested in the State on that date.

A. Federal Defendants' Motion

For the purpose of their motion, federal defendants concede the truth of the State's factual allegations concerning floatplane use on Slopbucket Lake. They maintain, however, that floatplane use is irrelevant to determinations of navigability for title.

Given the fact that the navigability test is used for different purposes, courts have occasionally recognized the need to distinguish the purpose for which a navigability determination is being made. *See Kaiser Aetna v. United States*, 444 U.S. 164, 171-72 (1979); *Oregon v. Riverfront Protection Association*, 672 F.2d 792, 794 n. 1 (9th Cir. 1982); *North Dakota ex rel. Board of University and School Lands v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982). This need arises in the present case, but for a reason previously unaddressed.

The court perceives a need to distinguish those cases in which navigability was determined concerning the power to regulate under the Commerce Clause from cases in which navigability was decided for title purposes. In *The Montello*, 87 U.S. (20 Wall.) 430 (1874), the Supreme Court liberalized the navigability test stated in *The*

Daniel Ball. Both of these cases involved a navigability determination relative to Congress' power to regulate under the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. *The Montello* holding may be interpreted as a recognition that any mode of conducting commerce may be considered in determining navigability. *See* 87 U.S. (20 Wall.) at 441-42. The court believes this to be true insofar as the Commerce Clause is at issue. It is especially true considering that since the time *The Montello* was decided, Congress' power under the Commerce Clause has greatly increased. A finding of navigability is no longer even necessary in order for Congress to be able to regulate commerce on a waterbody. *See Kaiser Aetna v. Riverfront Protection Association*, 444 U.S. at 173-74. There is no case involving navigability for title, however, in which a court has intimated that any and all modes of conducting commerce may be considered in making the navigability determination.

While the navigability test of *The Daniel Ball* has lost its importance regarding Commerce Clause analysis, it remains the starting point in determining navigability for resolving title to submerged land. *See Utah v. United States*, 403 U.S. at 11. The Supreme Court recognizes that each application of the *Daniel Ball* test is "apt to uncover variations and refinements which require further elaboration." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406 (1940). These words ring true in the present case. No federal court decision exists in which floatplane activity was considered in determining navigability for title., The phenomenon is no doubt due in part to the fact that floatplanes did not exist until the twentieth century, and few states have joined the Union since that development.

The State makes many arguments in opposition to federal defendants' motion, and not all of them need be addressed. Much emphasis is placed by the State on the portion of the navigability test regarding the mode by which commerce is or may be conducted. *See The Daniel Ball*, 77 U.S. (10 Wall.) at 563. The court believes this factor is the pivotal consideration in the present case. There is no need for the court to address other elements of the navigability test if it is initially determined that floatplane use is legally irrelevant to the analysis.

The State proposes that the mode element of the test should be liberally construed to include floatplanes, and in support thereof acknowledges the following Supreme Court reasoning:

> [T]he true test of navigability . . . does not depend on the mode by which commerce is or may be conducted . . . The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river [waterbody], rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, *no matter in what mode the commerce may be conducted*, it is navigable in fact, and becomes in law a public river or highway.

The Montello, 87 U.S. (20 Wall.) 430, 441-42 (1874) (emphasis added).

The above quote does not stand for the proposition that *any* mode of commerce may be considered in applying the test of navigability for title. *The Montello* concerned a navigability determination for a purpose related to Congress' authority to regulate under the Commerce Clause, so any type of mode might have been properly considered. A narrower construction is necessary when navigability is being determined for the purpose of resolving title to submerged land.[5]

The test set forth in *The Daniel Ball* refers to "customary modes in which such commerce is conducted *by water*." 77 U.S. (10 Wall.) at 563 (emphasis added). The State might well be able to persuade the trier of fact that floatplanes constitute a customary mode of conducting commerce in Alaska. It is also true that

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[5]In *George v. Beavark, Inc.*, the Eighth Circuit stated it was "wary of unnecessary extension of any rule on navigability, particularly when it could well lead to absurdity." 402 F.2d 977, 981 (8th Cir. 1968). Absurd results would no doubt occur in the present case if floatplane use were deemed legally relevant in determining navigability for title. There are over three million lakes in Alaska and a great number of them are accessible by floatplane. A ruling in favor of the State would severely complicate the land selection scheme in Alaska which Congress set forth in the Alaska Statehood Act and ANCSA. *See* Alaska Statehood Act, Pub. L. No. 85-508, § 6(a), 72 Stat. 340 (1958); Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1976).

floatplane activity occurs, in part at least, upon the water. The court rules as a matter of law, however, that floatplanes may not be considered a mode of conducting commerce *on water* for the purpose of determining navigability for title. The court interprets the navigability test, insofar as it is used to determine title to submerged lands, to be limited to consideration of modes of commerce that operate primarily on the water. That is, the mode must be primarily waterborne in nature. Hence, conventional waterborne vessels that do not leave the water are modes of conducting commerce within the *Daniel Ball* test. *See, e.g., Utah v. United States*, 403 U.S. at 11-12 (passenger boats, excursion boats, livestock boats); *United States v. Utah*, 283 U.S. 64, 82 (1931) (rowboats, flatboats, barges, steamboats); *United States v. Holt State Bank*, 270 U.S. at 56 (sailing vessels). Conventional waterborne vessels that are temporarily removed from the water, *e.g.*, to portage, are also modes within the test of navigability for title. *See United States v. Oregon*, 295 U.,S. at 21 (canvas canoes); *North Dakota ex rel. Board of University and School Lands v. Andrus*, 671 F.2d at 277-78 (canoes). In addition, it is not even necessary that a vessel be used in conducting the commerce. The mere floating of logs has been considered a mode of conducting commerce wihin the *Daniel Ball* test. *See Oregon v. Riverfront Protection Association*, 672 F.2d at 795.

All the previously recognized modes of conducting commerce in determining navigability for title involve either vessels or activities in which the commerce at issue is conducted primarily on the water itself. Since floatplanes operate primarily in the air as opposed to the water, they are not a mode of conducting commerce on water for the purpose of the test. The court does not accept as controlling the State's argument that floatplane activity on the water is part of a continuous joint air-water highway over which commerce is conducted. The argument has merit in determining whether Congress has power to regulate via the Commerce Clause. As stated previously, however, the navigability test in the present case is being applied for a different purpose.

Federal defendants have postured their motion seeking a ruling as to aircraft in general, yet their memorandum focuses only on floatplane use. While it is conceivable the present ruling will also

be applicable to uses by skiplanes, helicopters and all other aircraft capable of landing on water but operating primarily in the air, this memorandum and order addresses only floatplane use. The court therefore grants partial summary judgment to the federal defendants to the effect that floatplane activities on Slopbucket Lake are not modes of conducting commerce on water for the purpose of determining navigability for title. Such activities are legally irrelevant to the navigability determination.

B. *Plaintiff's Motion*

The State seeks summary judgment to the effect that Slopbucket Lake was navigable in its entirety on January 3, 1959, when Alaska became a State, and that title to the bed of the lake vested in the State of Alaska on that date. The memorandum accompanying the State's motion emphasizes that the court need only rule on whether the floatplane mode of conducting commerce on water may be ignored in making navigability determinations.

As the preceding analysis indicates, floatplane activities are legally irrelevant in making navigability determinations for the purpose of resolving title to submerged lands. This ruling must be construed narrowly, however, so as not to preclude consideration of floatplane activities in navigability determinations related to admiralty jurisdiction or Congress' power under the Commerce Clause. Summary judgment is therefore denied the State.

Accordingly, IT IS ORDERED:

1) THAT partial summary judgment is granted federal defendants to the effect that floatplane activities are not modes of conducting commerce on water for the purpose of determining navigability for title. Such activities are legally irrelevant to the navigability determination.

2) THAT summary judgment is denied plaintiff.

DATED this 12th day of May, 1983, at Anchorage, Alaska.

s/ JAMES A. VON DER HEYDT
United States District Judge

cc: U.S. Attorney
John D. Foster
Kenneth C. Powers
Robert H. Hume, Jr.
Douglas B. Baily

APPENDIX D

United States District Court
District of Alaska

STATE OF ALASKA v. UNITED STATES OF AMERICA, JAMES WATT, Secretary of the Interior, CURTIS V. MCVEE, *et al*	**JUDGMENT IN A CIVIL CASE** Docket Number A81-265 CIV

Presiding Judge: James A. von der Heydt

☐ *Jury Verdict.* This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ *Decision by Court.* This action came for consideration before the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

PLAINTIFF'S complaint requesting that Slopbucket Lake be declared a navigable waterbody and that title to the lakebed be quieted in the name of the State is dismissed with prejudice. Judgment is entered in favor of all defendants.

APPROVED:

s/ JAMES A. VON DER HEYDT

James A. von der Heydt
Chief Judge, U.S. District Court

DATE: January 20, 1984